

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES**

AMPERSAND PUBLISHING, LLC, d/b/a  
SANTA BARBARA NEWS-PRESS

Employer

and

31-RC-8602

GRAPHICS COMMUNICATIONS  
CONFERENCE

Petitioner

*Sandra McCandless, Atty. (Sonnenschein Nath & Rosenthal LLP)  
and David Millstein, Atty. (Millstein & Associates), both of  
San Francisco, CA, for the Employer.*

*Ira L. Gottlieb, Atty., (Geffner & Bush), Los Angeles, CA,  
for the Petitioner.*

**ALJ REPORT AND RECOMMENDATION TO OVERRULE  
EMPLOYER'S OBJECTIONS AND CERTIFY PETITIONER**

**WILLIAM L. SCHMIDT**, Administrative Law Judge: Pursuant to a petition filed on August 10, 2006,<sup>1</sup> and a Stipulated Election Agreement thereafter executed by the parties, a secret ballot election was conducted under the supervision of the Regional Director for NLRB Region 31 on September 27 in a unit of employees the parties stipulated to be appropriate.<sup>2</sup> The tally of ballots served on the parties following the ballot count reflected approximately 42 eligible voters, 33 votes cast for the Petitioner (Graphic Communications Conference or GCC),<sup>3</sup> 6 votes cast against Petitioner, and 1 challenged ballot. The challenged ballot was insufficient to affect the election results.

On October 3, Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press (SBNP, Employer, Company, or News-Press) filed four objections to conduct affecting the election

---

<sup>1</sup> If not shown otherwise, all dates refer to the 2006 calendar year. "E" and "P" references refer to the Employer exhibits and Petitioner exhibits, respectively. The "T" references are to the transcript pages and lines. "Br." references are to pages in a brief.

<sup>2</sup> The unit includes all full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Employer's Anacapa Street facility located in Santa Barbara, California, but excludes all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

<sup>3</sup> The GCC affiliated with the International Brotherhood of Teamsters in early 2005.

results. Following his investigation, the Regional Director concluded that the Company's objections raised substantial and material factual and legal issues best resolved following a hearing. Accordingly, Regional Director ordered an objections hearing and directed that a report and recommendation concerning the objections be filed with the NLRB.

5

I conducted the hearing ordered by the Regional Director in Santa Barbara, California, on January 9 and 10, 2007. After considering the entire record, the credibility of the witnesses, and the briefs filed by the parties,<sup>4</sup> I recommend that the Board overrule all objections and certify the Petitioner based on these

10

## Findings of Fact

### A. Background

15

Every case has a context. A clash between the owner-publisher's vigorous management style and the adopted professional standards of several newsroom editors (generally statutory supervisors) and writers (generally statutory employees) dominates the context here. It provided the impetus for most of the News-Press editors to suddenly resign and for the newsroom employees' effort to gain union representation. As the upheaval progressed, members of the community chose sides.

20

A lingering dispute about the divide between the paper's news content and its business/opinion operations came to a head in late June and early July after Wendy McCaw, SBNP's owner and co-publisher, reprimanded two members to the news staff for a story published in the News-Press about a local zoning hearing. The story contained the future home address of a celebrity actor, the central figure in the zoning hearing. The reprimands sparked the resignation of several top editors on July 6, including the paper's executive editor, its managing editor, its deputy managing editor, its city editor, its business editor, and its sports editor. Other protest resignations followed.<sup>5</sup>

30

Co-publishers McCaw and Authur von Wiesenberger were away on vacation when the July 6 resignations occurred. Before leaving, they appointed Travis Armstrong, the editorial page editor, as the acting publisher during their absence. Around 9:30 a.m. on July 6 Armstrong approached Jerry Roberts, the executive editor who had just resigned, as he sought to bid farewell to the newsroom staff for the purpose escorting Roberts from the building. A hail of expletives directed toward Armstrong from two, three, or maybe more of the newsroom staffers began. Jane Hulse (aka Jane B. Chawkins), the city editor who also resigned that day, was, in Armstrong's words, "just out of control." After walking about twenty feet, Armstrong left the task of escorting Roberts from the building to human resources director Yolanda Apodaca. Armstrong then returned to the newsroom where he directed the sobbing Hulse to leave also because she had "quit" that day. He then addressed the rest of the staff present saying that "we're going to move to hire replacements and we'll move on." T139: 7-T141: 18.

35

40

45

That evening several newsroom employees met with GCC organizer Marty Keegan for the first time. The ensuing organizing effort involved numerous meetings between Keegan and

---

<sup>4</sup> The briefs incorrectly denote Ampersand Publishing, et al, as "Respondent." In this representation proceeding, that business entity is designated as the "Employer."

50

<sup>5</sup> Thus, five staff writers, a columnist, and a copy editor resigned in the days following July 6. Exhibits E-1 and E-18.

the unit employees; public rallies that occasionally featured street theatre,<sup>6</sup> press conferences and radio appearances by Keegan and GCC’s attorney; union appeals to advertisers and subscribers to boycott the SBNP until it bargained an agreement with newsroom employees, two or three in-house demonstrations by the newsroom employees; and an active website (savethenewspress.com) endorsed by Keegan and maintained by unit employees supporting the union. SBNP’s publicist characterized these legally protected activities as an “all out war.”

For its part, the SBNP issued several in-house memos opposing unionization, published editorials attacking the Teamsters, hired a labor consultant to conduct numerous meetings seeking to persuade employees to vote against union representation,<sup>7</sup> conducted meetings with supervisors to inform them of their role during the organizing campaign, and hired an outside publicist to provide damage-control assistance and to publicize SBNP’s position on the union organizing activities.

Many in the Santa Barbara community also became actively involved in the upheaval at the News-Press. Early on the mayors from Santa Barbara and a couple of nearby communities as well as several city council persons staged their own rally at the Plaza protesting the events that lead to the resignation of the editors and several popular writers. Press coverage of the News-Press turmoil began locally but quickly spread to area publications and eventually to nationwide newspaper and television outlets. Popular cyber sites focusing on events in the Santa Barbara area became consumed with the News-Press turmoil.

One such website, BlogaBarbara, provides the framework for Objection No. 1. A person using the pseudonym “Sara de la Guerra” owns and hosts BlogaBarbara.<sup>8</sup> Her postings generated numerous comments from persons who almost always chose to use pseudonyms or to remain anonymous altogether. Since BlogaBarbara does not require readers to register, identification of those who submit comments is not possible by any ordinary means. From mid-year onward several of de la Guerra’s postings on BlogaBarbara related to the controversy at the News-Press. These postings generated numerous comments about SBNP’s ownership and senior management as well as the newsroom organizing drive.

#### B. Events Relevant to the Objections

Discussions about the editors’ displeasure with SBNP’s current ownership<sup>9</sup> and the possibility of unionizing the newsroom preceded the July 6 resignations. Deputy managing editor Don Murphy, who resigned on July 6 after nineteen years at the News-Press, recalled

<sup>6</sup> Usually, the public rallies occurred in De La Guerra Plaza (Plaza) directly in front of the News-Press headquarters in downtown Santa Barbara. One of the more well-publicized street theatre skits included the appearance of newsroom employees with mouths sealed by duct tape in protest of rules barring employees from public discussions of various News-Press issues without prior management approval. In a complaint that issued on December 27, the NLRB General Counsel alleges certain of these rules violate the Act.

<sup>7</sup> The Employer’s labor consultant conducted most of the captive audience meetings with the employees in the two-week period immediately prior to the election. T163: 17-24; T165: 1-3.

<sup>8</sup> To date, no one knows the true identity of Sara de la Guerra. The Employer correctly noted in its brief that I had a posthearing exchange with an Electronic Frontier Foundation (EFF) attorney claiming to represent Sara. Employer’s Brief 16, fn 19. Counsel received copies of this correspondence. In my judgment, it has no relevance to the issues at hand but it will be included in the record submitted to the Board as ALJ Exhibits 1 (EFF letter) and 2 (my reply).

<sup>9</sup> The *New York Times* organization sold the *New-Press* to its current owner in 2000.

5 general discussions prior to GCC’s organizing effort about union representation for the newsroom employees. Thus, on one occasion in June “when the situation wasn’t so good” Murphy spoke to News-Press columnist Starshine Rochelle on the loading dock. When the subject of their conversation turned to unionization, Murphy told her that he would probably be thinking about a union. T195: 1-13.

10 By late in the afternoon on July 13, a week after the core of the editorial staff and some of the staff writers resigned, a group of newsroom employees prepared a letter addressed to acting publisher Armstrong and delivered it to him in his office. The letter states:

15 We, the newsroom employees of the Santa Barbara News-Press, can no longer remain silent about the intolerable conditions at the newspaper we love. We respectfully request that you:

1. Restore journalism ethics to the Santa Barbara News-Press: implement and maintain a clear separation between the opinion/business side of the paper and the news-gathering side.
- 20 2. Invite back the six newsroom editors who recently resigned: Jerry Roberts, newsroom editor; George Foulsham, managing editor; Don Murphy, deputy managing editor; Jane Hulse, city editor; Michael Todd, business editor and Gerry Spratt, sports editor.
- 25 3. Negotiate a contract with newsroom employees governing our hours, wages, benefits and working conditions.
4. Recognize the Graphic Communications Conference of the International Brotherhood of Teamsters as our exclusive bargaining representative.

30 We look forward to discussing these issues further with you.

Thank you.

35 The group delivering the letter included more than 15 and perhaps as many as 20 newsroom employees led by reporters Barney McManigal and Josh Molina. Normally, Armstrong leaves his office door open. When the group arrived with the letter, six or seven employees entered the office; the rest remained in the narrow hallway outside that divides Armstrong’s office from the cubicles where his staff works.

40 Armstrong, who was engaged in writing an editorial at the time, told the employees that he found the gathering in his office “overwhelming and intimidating.” He said that he asked the group “to do this at another time and another place.” When one of the employees handed the letter to him, he put it on his desk and remarked that “this is making me very uncomfortable.” Armstrong said that the group just stood there for what seemed to him “like an eternity.” He estimated the engagement lasted three to five minutes. However, Armstrong never specifically directed the employees to leave his office and no evidence would reasonably support an inference or a factual finding that the employees engaged in any form of loud, unruly, disruptive, destructive, or overtly threatening conduct. T123:11-125: 9. Similarly, no evidence shows that the Employer later disciplined any employee for participating in this letter-delivery exercise.

50 Thomas Schultz, a staff writer active with the union organizing effort, accompanied the employee group on July 13. He was among those who entered Armstrong’s office; others he

remembered inside the office were reporters McManigal, Molina, and Dawn Hobbs. Schultz also recalled that Armstrong told the group that he felt uncomfortable with “this” after the letter was presented to him. Schultz told Armstrong that they wanted a response by 5 p.m. the following Monday.<sup>10</sup> According to Schultz, the entire visit took a minute or less but when the employees began to leave, Armstrong asked to speak privately with McManigal. McManigal remained behind but the others left.<sup>11</sup> T296: 23-T299: 2.

The first union rally at the Plaza occurred during the lunch hour on Friday, July 14. About 300 persons attended. Even more appear to have attended a noontime rally at the same location the following Tuesday, July 18. Whether the GCC organized this latter event is unclear. However, the featured speakers at the July 18 rally included the mayors from Santa Barbara and the nearby communities of Goleta (where SBNP’s printing facilities are located) and Carpinteria. Apparently, some of these public officials had axes to grind with the News-Press. Exhibit E-14.

Andrea Huebner, the life section editor at the time, went to both rallies as a spectator and not as a participant.<sup>12</sup> She referred to the July 18 event as a “peoples” rally rather than a union-sponsored occasion. At one of these two rallies, she assisted life section intern Bethany Hopkins who had been assigned by the Scott Steepleton, the new city editor, to cover the event as a reporter.<sup>13</sup> Huebner spent about 20 minutes at the rally she attended with Hopkins and spoke to no other employees other than Hopkins. Her discussions with Hopkins primarily related to instructions for “covering the event” such as getting the names of those who spoke, getting a count of the number in attendance, and the like.

Steepleton saw Huebner in the audience when he looked out the window on the way to a manager’s conference. Huebner claimed she never knew about a manager’s conference scheduled for that particular day. No evidence establishes that Steepleton or any other manager ever spoke to Huebner about her presence at the July rallies or her absence from the managers’ meeting that allegedly occurred.

---

<sup>10</sup> Petitioner’s counsel implied in his diary posted on a website that the Employer responded to the employees’ July 13 letter by telling them that any representation question had to be settled through the NLRB. Exhibit E-7: 2. McCaw made that same point in her wide-ranging commentary published in the News-Press on July 25. Petitioners Exhibit 8: 1. McCaw also made it clear that the Company would not return the former editors and reporters as requested in that letter.

<sup>11</sup> The variance in the length of time this activity took may well be explained by the fact that Armstrong might have included the time that he spent with McManigal. Schultz and two or three other reporters waited outside in the hallway until McManigal finished and then walked back to the newsroom with him. Presumably the others returned to work or left the building earlier.

<sup>12</sup> About two weeks following her September 12 termination from SBNP, Huebner also attended the last union-sponsored rally, again as a spectator. This rally, held on Sunday, September 24, was the last major union event prior to the election.

<sup>13</sup> I have concluded that Huebner is confused in her recollection that she assisted Hopkins at the July 14 rally. Other evidence shows that Steepleton had not yet returned from his vacation that week so I have concluded that Steepleton probably assigned Hopkins to cover the July 18 rally. When he returned from vacation, Steepleton replaced Hulse as the city editor and a month later he became the associate editor. Before leaving on vacation he had been the assistant city editor.

Toward the end of July or in early in August, the GCC, with the assistance of several newsroom employees, established a website with the domain name savethenewspress.com to provide information about the organizing effort and to solicit community support. After it was established, Keegan and several pro-union employees regularly participated in maintaining the website.

The top of the savethenewspress.com homepage reads in bold letters:

**“SAVE THE SANTA BARBARA NEWS-PRESS”**

The content on the left side of the home page contains a message “from the newsroom staff” to the community. It invited readers to join the “organized staff” of the SBNP in their effort “to restore journalistic integrity to the paper and negotiate a fair working contract.” Asserting that “recent weeks have brought unprecedented upheaval to the institution we love,” the community letter states “[w]e need your help” and solicits the reader to print, sign and mail a subscription-cancellation card to the GCC’s local post office box. The card declares that the signer supports the “organized” staff’s goals of restoring journalistic integrity, obtaining union recognition, and negotiating a “fair employment contract.” The bottom of this subscription-cancellation card reflects that it is paid for by the GCC. The homepage concluded with a list of the editors, reporters and columnists who resigned in July and expressed a note of thanks to them. The right side one-third of the home page contains links to other pages pertaining to community assistance, the widespread media coverage about the SBNP situation, and documents of potential interest website visitors.

At least one effort to publicly advertise the web site did not sit well with SBNP management. Schultz regularly parked his Volvo automobile in the newspaper lot. In early August, Schultz taped a display on his rear window that included, in this order, a copy of the News-Press masthead, a GCC/Teamster bumper sticker, and a hand-made strip across the width of the window promoting the savethenewspress website.

Around August 8, the News-Press co-publishers observed Schultz’ rear-window display while walking through the parking lot and von Wiesenberger photographed the display. When word of the photographing reached Shultz on August 9, he emailed Apodaca seeking an explanation. She replied the following day. Her email explained that his car had been photographed so the Company could seek an opinion from its legal counsel concerning his use of SBNP’s masthead. She continued by advising Schultz that, in the opinion of SBNP’s attorney, his display of the masthead amounted to an unauthorized use of the Company logo and infringed upon Ampersand’s exclusive trademark. She asked that he promptly remove the masthead from his windshield and not display it in the future.<sup>14</sup> Later that same afternoon Shultz reported to Apodaca by email that he had removed masthead display as she requested. Exhibit P-9. Shultz never displayed the masthead after that.<sup>15</sup> T300: 15-16.

On August 24 approximately 25 or so newsroom employees assembled near the desk of Dawn Hobbs around 3 p.m. The group then “marched” or walked in the direction of McCaw’s

<sup>14</sup> Apodaca also explained to Shultz that several other autos with Teamster bumper stickers had been observed but they had not been, and would not be, photographed because employees had a right to make this expression of support.

<sup>15</sup> Meanwhile the GCC filed an unfair labor practice charge alleging that management’s photographing of Shultz’ rear window display violated Section 8(a)(1) of the Act. The Regional Director dismissed that allegation. Exhibit E-6.

office with the purpose of delivering a letter addressed to her said to be signed by 25 staff members. This letter (Exhibit P-2) reads:

5           Please respect our wish to be represented by a union without fear of threats or harassment.

          In recent weeks, some of us have been taken off our beats, removed from night editing jobs and summoned to Human Resources to answer questions about our stories. One union supporter was punished with the loss of her column. The car of another supporter was photographed because of pro-union slogans in the window.

10           Now we are confronted with a conflict of interest policy that requires us to seek an editor's permission before speaking in public on our own free time about our efforts to unionize.

          Finally, some of our managers have been pressured to dissuade us from forming a union.

15           These actions are unprecedented at the News-Press and clearly seek to rob us of our individual liberties. Please stop trying to intimidate us. Let us make up our own minds about joining a union.

20           When Steepleton noticed the group beginning to gather, he instructed the employees to get back to work and proclaimed that they could not "do this." One obeyed but the rest continued single file toward McCaw's office. When the group arrived there, Steepleton, who had followed behind at a distance, heard someone shake the door handle which apparently locked. Following that, he heard a woman say, "Let's try the side door (to McCaw's office)." Shortly afterward, he heard another voice say, "She's not here."<sup>16</sup>

25           The group then proceeded down another hallway that led past Armstrong's office. Armstrong walked into the hallway just as the group passed. Al Bonowitz, the travel editor at the time, inadvertently bumped Armstrong's shoulder as they passed in the narrow hallway. According to Armstrong, Bonowitz turned and "scowled" at him. The group continued to an interior stairwell leading to the lower floor and Apodaca's office. By then Steepleton had returned to his office to telephone Apodaca. She told him that the group had just arrived at her office. A short while later, the group returned to work on the newsroom floor. Steepleton estimated this employee action lasted three to five minutes. T52: 21-23.

35           No one testified about what occurred when the employees reached Apodaca's office. However, after the group returned to work, Apodaca requested, through Steepleton, that Schultz call her about delivering the McCaw letter to her. T104: 10-15. That evening Shultz e-mailed Apodaca to thank her "on behalf of myself and the other signatories to (the McCaw letter) for handling our request today." Shultz went on to express his appreciation for Apodaca's effort to determine whether Ms. McCaw, Mr. von Wiesenberger, or one of the SBNP attorneys might be available to personally accept the letter. Shortly afterward, Apodaca emailed Shultz thanking him for his note of appreciation. Exhibit P-10.

45           Steepleton claimed the August 24 group "marched" along single file making a loud stomping noise and, when gathered in front of McCaw's office door, they looked like "kind of a mob." T48: 2-4. Armstrong thought the group resembled "storm troopers" as they passed him but, contrary to Steepleton's claim, he said there was no noise associated with the employee

50           <sup>16</sup> Likewise, it also appears that McCaw's administrative assistant, who normally works in an area outside McCaw's door, was also absent.

“march” to McCaw’s office. T121: 23-T122: 7. Carpeting covers the entire area where the newsroom and McCaw’s office are located; the steps leading to the floor below are tiled.

5 On August 31 Steepleton notified 11 employees of a two day suspension for participating in the August 24 action His memo charged that “[t]his action was a clear and outrageous attempt to physically intimidate Mrs. McCaw and everyone else in the workplace by the improper and alarming confrontation undertaken after clear instructions to return to work.” His memo accuses the participants of “parading through the building” disrupting other workers and of interrupting a meeting in Apodaca’s office. Steepleton threatened possible termination  
10 for any further conduct of that sort. Exhibit P-3.

The week’s interval also caused Apodaca’s tone to chill. She issued a memo on August 31 to all newsroom employees that said the type of disruption and insubordination that occurred on August 24 would not be tolerated. Her memo also asserted that “[w]e will not permit  
15 employees to threaten and intimidate other employees in this or any other manner” and concludes by saying that future conduct of this sort would be “subject to discipline up to and including termination.” Unlike the Steepleton memo, Apodaca made no reference to the group interrupting a meeting in her office on August 24. Exhibit P-19. Although Apodaca did not testify concerning the August 24 events, the claim about a meeting in her office may explain her  
20 request that Schultz deliver the letter later.

On September 7, two weeks following the letter-delivery exercise, the co-publishers waded into the fray over the August 24 events. McCaw and von Wiesenberger issued a joint memo to all employees that day to express regret because those “personally and professionally  
25 dedicated to your jobs are being placed in an uncomfortable and difficult situation by a small group of employees.” In the next sentence they allege that “a large number of newsroom staff marched en masse throughout the building a couple of weeks ago” in “a deliberate attempt . . . to confront, threaten and physically intimidate all of us in the building and interfere with our work. They claimed the action “created emotional and physical threats among our staff.” Their  
30 memo goes on to inform employees that the Company disciplined those involved and filed unfair labor practice charges against the union for inciting “this coercive, intimidating and threatening behavior in the workplace.”<sup>17</sup> They also stated their belief that the employees did not need union representation and decried the GCCs organizing tactics. Exhibit P-16.

35 The Employer adduced no testimony in support of the theme running through all three memos that the group seeking to deliver the McCaw letter sought to “confront, threaten, and physically intimidate” anyone.

40 Dan Myers served as an assistant city editor at the News-Press for a couple of months following Steepleton’s promotion out of that position in mid-July. Myers usually worked at night in an area by himself. The Union refused to stipulate that Myers was a statutory supervisor. Apodaca asserted that Myers supervised about 10 or 12 employees. She also said that he had the authority to schedule employees and that he had “the ability to make recommendations that might affect employee hiring, promotions, and other employment activities” but that he never  
45 made any such recommendations because of his short tenure at SBNP. Apodaca asserted that

---

50 <sup>17</sup> SBNP’s counsel filed NLRB Case 31-CB-12071 against GCC on August 31. That unfair labor practice charge alleges, among other matters, that the GCC engaged in a “course of confrontational and intimidating conduct” on August 24 that violated Section 8(b)(1)(A) of the Act. Exhibit P-4A. The Regional Director dismissed that case in its entirety and the General Counsel subsequently denied SBNP’s appeal from that dismissal. Exhibits P-4B and P-4C.

other editors make recommendations about hiring, promotions, and discipline. T152: 11-  
T153: 8. Regardless, Myers claimed that his supervisory status was never made clear to him.

Myers talked to Dawn Hobbs and a couple of copy editors, all strongly prounion. The  
5 content of their discussions primary involved their reports to him about the progress of the union  
campaign. One day in early September, Steepleton observed Myers wearing a union button at  
work. Steepleton verbally reprimanded Myers for wearing the button and told him that “as a  
manager” he should campaign against the union organizing effort. Myers never followed  
10 Steepleton’s instructions about campaigning because he believed in the union cause but no  
evidence shows that he continued to wear the union button. On Sunday, September 24, Myers  
attended the GCC rally at the Plaza that featured Delores Huerta, co-founder of the United Farm  
Workers and a California labor movement icon. On September 28, the day after the election,  
the Santa Barbara Independent published a picture of Myers with several other prounion News-  
Press employees at that rally.<sup>18</sup> Exhibit E-5; T68: 17-T70: 13.

15 On September 3 and again on September 5, the News-Press published editorials  
attacking the GCC’s organizing tactics among the newsroom employees and the more sordid  
aspects of the Teamsters history. The editorials cited statistics about actions brought against  
union officials for engaging in violent conduct and against unions for engaging in “illegal restraint  
20 and coercion of employees.” Exhibits P-6 and P-7.

The parties entered into the stipulated election agreement on September 11 and the  
Regional Director approved it on that same date.<sup>19</sup> The agreement provided that the election  
would be held on September 27 in the unit described in footnote 2, above. Later, that day,  
25 Apodaca notified employees by memo about the requirements of the Board’s *Exce/sior* rule that  
requires the disclosure of the employee names and addresses to the union for use in an  
election campaign.

Shortly after noon on September 11, BlogaBarbara’s de la Guerra put up a post about  
30 an allegation that SBNP objected to links on the EdHat.com website that permitted its readers to  
access obituaries published in the News-Press. Over the next three days the EdHat post drew  
59 comments, including the “Phase 2” comment submitted from an unknown source that said  
nothing about the EdHat post. This comment, dated September 11 at 8:51 p.m., stated:

35 Friends:

It is time to commence Phase 2 of our operations against the News-Press. Management  
has continued to exhibit intransigence in the face of our initial efforts, so it is time to step  
40 up the pressure.

1. In addition to encouraging people to cancel their subscriptions to the newspaper, it’s  
important to cut off the paper’s economic base by refusing to patronize News-Press  
advertisers. This includes classified advertisers. It’s important that we tell the  
45 advertisers why we are boycotting their businesses.

---

<sup>18</sup> The Independent is a local newspaper published weekly that reported extensively about  
50 the upheaval at SBNP. It is considered to be a News-Press competitor.

<sup>19</sup> The Employer attached a copy of the September 11 stipulated election agreement to its  
brief and requested that I take official notice of it. That request is granted.

2. To disrupt the paper's operations, a campaign of cyber-sabotage will be initiated. Former employees are knowledgeable about the company's IT systems and operational vulnerabilities. This expertise will be used to disrupt News-Press email, and possibly could be escalated to delete stories after they are written or finished pages of the paper being sent to production. In addition, the web site will be hacked so that readers are directed to www.samethenewspress.com.

3. In a lower-tech form of economic sabotage, newspaper boxes will be emptied of their contents so that the paper will suffer a huge downturn in single-copy sales.

4. To target home deliveries, we will go door to door distributing leaflets to homes and apartments that receive the News-Press. The leaflets will encourage the subscriber to discontinue the subscription and explain the reasons for doing so.

5. If the above measures fail, the campaign will be shifted to the News-Press printing plant on Kellogg Avenue in Goleta. Specifics of this campaign will be announced if and when it is necessary.

A BlogaBarbara comment dated September 11 at 10:44 p.m., about two hours after the Phase 2 comment and allegedly from Al Bonowitz, reads:<sup>20</sup>

I am speaking only for myself, but as a member of the organized newsroom staff of the SBNP, I am offended by the anonymous post of 8:51 p.m.

Boycotts are fine but hacking computers, stealing from newspaper boxes and threatening the printing plant (items 2, 3 and 5) are unacceptable actions to me and [I am] willing to bet that my colleagues would agree.

I appreciate the community's support for our plight, b[ut] this is the kind of assistance we can do without.

Exhibit P-15: 7.

Schultz saw the Phase 2 comment while it remained posted. Using the pseudonym "save it," he responded to it with this comment on September 11 at 11:21 p.m.:

Dear BlogaBarbara readers,

In case any of you are confused, the five-point plan espoused by 8:51 above is not some "phase 2" of the union campaign. Do not be fooled. We make major strategic decisions by consensus. And while it is true we are urging a boycott, as has been widely reported, I can assure you the sequence of ideas above was not discussed, nor is it in the playbook.

So listen loud and clear, we are not collaborating with former IT employees in some form of "sabotage." And if anybody out there intends to hack the News-Press Web site, I absolutely request you do NOT redirect to our own. We're getting enough hits as it is (keep telling your friends though), and are quite pleased about it.

<sup>20</sup> Bonowitz did not testify. Accordingly, his authorship of this comment is not authenticated.

We've taken the high road through this whole endeavor and will continue to do so until our election on Sept. 27, a date confirmed today as reported by the AP this evening (Monday). You can confirm this at Google News.

5

Thanks again, Santa Barbara, for your sensible support.

Exhibit P-15: 9-10.

10 Several other comments appeared condemning the action advocated in the Phase 2 comment. At 8:47 a.m. the next morning, de la Guerra provided her own comment explaining that a site administrator had removed the Phase 2 comment because it advocated “domestic terrorism.”

15 Shultz spoke to two or three other newsroom employees about the Phase 2 comment but he had no sense of it being widely discussed among the newsroom employees generally. No further evidence exists concerning the awareness on the part of unit employees about the Phase 2 comment. More particularly, the evidence does show or estimate the number of unit employees who saw or became aware of the Phase 2 comment.

20 Around September 18 or 19, Jackie Barnard, described as SBNP’s customer service manager, purportedly gave a copy of the Phase 2 comment to Apodaca.<sup>21</sup> In turn, Apodaca gave the copy to Andrea Huff, a public relations agent retained by the newspaper shortly after the raft of resignations in July. Huff prepared and issued a press release on behalf of SBNP on September 23 concerning the Phase 2 comment and caused it to be distributed over the  
25 Business Wire. Exhibit P-14. The Editor and Publisher (E&P) released a news story by Joe Strupp on September 25 following an interview with Huff about her press release. Exhibit 16. Shultz read the E&P article but no evidence shows how many other unit voters saw Huff’s news release or the E&P story. No evidence shows that the Company ever reported the Phase 2 threats to any police authority.

30

The strife at the News-Press also became grist on other blogs. The Employer’s brief cites three blog comments in fashioning an argument that inflammatory campaign propaganda caused unit employees to be prejudiced toward about SBNP’s management at the same time that the savethenewspress website portrayed unit-wide support for the Union. Employer’s Br:  
35 28-32.

40 One such comment appeared in response to an August 18 article on the Independent’s website about New-Press columnist Rochelle, an active Union supporter. This comment from an unknown person using the pseudonym “Harvey Milk” alluded to Armstrong’s purported sexual orientation and racial heritage even though he was not mentioned in the Rochelle article. The comment stated:

45 Reading Travis Armstrong’s San Jose Mercury columns...at the time of them he was fairly clearly gay; his columns describe boutiquing in the Castro district of SF with his partner and he also describes the domestic partner law in terms of his partner Greg.

50 <sup>21</sup> Barnard did not testify and no other management witness discussed her supervisory authority, if any. When and how Barnard obtained or became aware of the Phase 2 comment is not known. However, as de la Guerra removed the Phase 2 comment from BlogaBarbara on the morning of September 12, it may be inferred that either Barnard or her source would have had access to it during the limited twelve-hour period when it appeared on BlogaBarbara.

Nothing wrong with being gay, but somehow this possibility for Travis deepens the NP situation a bit...how does he feel about Dr. Laura? Did the old newsroom staff criticize him? How does his sexuality align with his Native American heritage.

5 Exhibit E-15: 1-2.

10 On September 12, the Union counsel published his “diary,” using the pseudonym “budlawman,” on a website named “Daily Kos.” The diary provided a one-sided viewpoint about the upheaval at the News-Press. Exhibit E-7. Certain blog readers commented on counsel’s diary and the Union’s counsel responded to some. Particularly irritating to the Employer was exchange between an unknown blog reader using the designation “LNK” and the Union’s counsel in reference to the News-Press owner and co-publisher that occurred about 10:30 p.m. on September 12. LNK wrote:

15 it would be fun to investigate her [McCaw], maybe catch her for non-payment of taxes.....And/or infiltrate, get hired to pamper her....As the economics professor, Michael Parenti says, the one thing you need to know is that the rich want EVERYTHING.

20 The Union’s counsel, responded:

25 Mrs. McCaw is the worst combination of a person with literally billions who acts as if she doesn’t care what the general public thinks of her, and is willing to spend endlessly on lawyers to do her bidding, regardless of the strength or ethics of her positions. She does have some sordid dealings in her past, but I don’t know of anything actually criminal.

Exhibit E-7: 12.

30 The third anonymous comment cited by the Employer appeared September 24 on BlogaBarbara among a long list of comments apparently in reference to Huff’s September 23 press release discussed above. It compared the “McCawCaw regime” to that of Kim Jong Il allegedly because of its “same propensity for unethical and erratic behavior.” Exhibit E-16: 4.

35 C. The Objections, Argument, and Analysis

40 Objection No. 1:<sup>22</sup> The Employer contends that during the critical period, the Union – or those acting on the Union’s behalf – made criminal threats directed at SBNP property. Such threats have a substantial destructive effect on campaign discussion and are therefore sufficient grounds for invalidating an election.

45 Employer’s Short Statement in Support of Objection 1: On or about September 11, 2006, a blog was posted on BlogaBarbara stating: “It is time to commence Phase 2 of our operations against the News-Press.” The blog continues with a list of specific improper threats to SBNP, including such criminal conduct as: (1) hacking into the SBNP IT system to disrupt email communications; (2) hacking into the SBNP IT system to delete stories after they are written or to delete finished pages of the paper being sent to production; (3) hacking into the

50 <sup>22</sup> The objections and the short statements in support are taken in haec verba from the objections document filed with the Regional Director on October 3. See Board Exhibit 1A: Attachment A.

SBNP website so that readers will be directed to the Union website; and (4) emptying newspaper boxes of their contents. The blog states that former employees will be used to access the News-Press IT system.

5 Objection No. 1 Argument and Analysis: No evidence establishes that either party is  
 responsible for the reprehensible Phase 2 comment. However, the Board will set aside  
 elections based on third party conduct but only where it is so aggravated as to create a general  
 atmosphere of fear and reprisal so as to render a free election impossible. *Robert Orr-Sysco*  
 10 *Food Services*, 338 NLRB 614, 615 (2002), citing *Westwood Horizons Hotel*, 270 NLRB 802  
 (1984) (*Westwood*). Usually, less weight is accorded to third party conduct because it tends to  
 have less effect upon voters than similar conduct by a party and because employers and unions  
 cannot prevent misdeeds by persons over whom they have no control. *Deffenbaugh Industries,*  
*Inc., v. NLRB*, 122 F.3d 582, 586 (8<sup>th</sup> Cir. 1997).

15 NLRB elections are not lightly set aside. *NLRB v. Hood Furniture*, 941 F.2d 325, 328  
 (5<sup>th</sup> Cir. 1991). The burden of sustaining an election objection is a “heavy one” that rests with  
 the party filing it. This burden requires the objecting party to show improper conduct that  
 interfered with employee free choice. *Werthan Packaging, Inc.*, 345 NLRB No. 30, slip opinion  
 at 2 (2005).

20 *Westwood*, the Board’s lead case involving third party conduct, involved a threat of  
 physical violence made by a prounion employee who was not a union agent. In that case, the  
 Board said it would evaluate third party conduct based on the threat’s character and  
 circumstances and not merely on the number of employees affected. The seriousness of a third  
 25 party threat, the *Westwood* Board said, is determined not only by the nature of the threat itself,  
 but also whether the threat encompassed the entire bargaining unit; whether reports of the  
 threat were disseminated widely within the unit; whether the person responsible for the threat  
 was capable of carrying it out and whether employees likely acted in fear of that capability; and  
 whether the threat was “rejuvenated” at or near the time of the election. 270 NLRB 803.

30 Applying the *Westwood* to the facts here, I find the Employer failed to meet the burden  
 required to sustain Objection 1. The threat contained in the comment pertained primarily to the  
 Company’s information technology (IT) operations and, to a lesser extent, its street vending  
 machines. Hence, the threatened actions pertained to the unit employees only indirectly and, to  
 35 the extent that it sought to affect the unit employees at all, its impact, if successful, would be  
 limited to their work product rather than their physical or emotional well-being.

40 The Company adduced no evidence that any of its former employees who might harbor  
 animus toward it likely possessed the requisite knowledge, skills and abilities required to invade  
 or disrupt its IT system in the manner suggested by the Phase 2 comment. Likewise, the  
 Company adduced no evidence that this threat was widely disseminated among the unit  
 employees, and of those who admitted knowing about it, at least one prounion employee  
 (Shultz), and perhaps a second (Bonowitz), publicly disavowed the criminal conduct suggested  
 by the Phase 2 comment. And to the extent that the threat was “rejuvenated” near the time of  
 45 the election, the Company itself did that.

Although counsel coaxed a vague assertion from von Wiesenberger that the Company  
 made capital expenditures to protect its IT system after the threat, no evidence shows that the  
 Company took no other steps to alert management personnel or to report the threat to police  
 50 authorities. I find the Employer’s case further weakened by its failure to call Jackie Barnard to  
 explain her responsibilities with the Company, when and how she came to possess a copy of  
 the Phase 2 comment that appeared for such a limited period of time, and, if she obtained a

copy of the comment when it remained on BlogaBarbara, why she waited for more than a week to call it to the attention of any other Company official.

5 Accordingly, I have concluded that the anonymous Phase 2 threat that appeared for a limited 12-hour period two weeks prior to the election before being suppressed by the blog host does not constitute aggravated conduct that created a general atmosphere of fear and reprisal that would render a free election impossible. Therefore, I recommend Objection 1 be overruled.

10 Objection No. 2: The Employer contends that during the critical period, the Union initiated a campaign of false and misleading propaganda so that employees and other were unable to separate truth from untruth and their free and fair choice was affected.

15 Short Statement in Support of Objection 2: The Union created a false impression to confuse employees and others that the SBNP supported and endorsed the Union’s organizing activities. The Union did so by authorizing and encouraging the use of the SBNP banner for display next to Union bumper-stickers for the purpose of suggesting SBNP sponsorship of the Union. The Union also established a website with the domain name “savethenewspress.com,” an inherently confusing domain name (because of the inclusion of “thenewspress”) with  
20 confusing content (in that a user cannot be sure whether the website is a SBNP or Union site as it contains such official content as subscription cancellation cards).<sup>23</sup>

25 Objection No. 2 Argument and Analysis: In its post-hearing brief the Employer argued that the election should be set aside because Union-endorsed savethenewspress.com website amounts to the type of misrepresentation and artful deception condemned by the courts in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) and *NLRB v. Gormac Custom Mfg., Inc.*, 190 F.3d 742 (6<sup>th</sup> Cir. 1999). The Employer further asserts that the Union’s deceptive impersonation on its savethenewspress.com website interfered with employee choice in the election by falsely depicting universal support of the newsroom employees, leading them to believe that a Union  
30 victory was a foregone conclusion. The existence of an inconspicuous reference to the Union on the subscription cancellation card, the Employer asserts, is “not sufficient to ameliorate the deceptive picture of universal employee support for the Union that the website evinces.”

35 The Employer further argues that *Midland Midland National Life Insurance Co.*, 263 NLRB 127 (1982) applies here because the letter to the community gives the impression that unionization has already occurred or is at least a foregone conclusion. In addition, the Employer asserted that it would be impossible to tell from viewing the website that union representation would be decided in an election yet to come and that the website’s “deceptive design” prevented anyone who viewed it from “recognizing it as Union propaganda, rather than  
40 the Newsroom’s expression of its support for the Union or even an official announcement of the Newsroom’s organized status.” And, as noted, the Employer argues that while savethenewspress painted a false portrait of total unit support for the union, union supporters employed “impermissible derogatory rhetoric” to prejudice newsroom employees against management. Employer Br: 26-32.

45 \_\_\_\_\_  
23 The Employer’s reference to the SBNP banner appearing next to union bumper stickers refers to the display that appeared on the rear window of Schultz’ auto. As the Employer’s argument on brief fails to address this matter, I assume that it has chosen to abandon the claim that his window display suggested “SBNP sponsorship of the Union.” Likewise the brief  
50 appears to have abandoned the claim that SBNP and savethenewspress websites are so similar that they would confuse voters. As is evident, I would find both arguments lack merit.

5 The savethenewspress website certainly does not implicate *Savair*. The union in *Savair* offered to waive its standard initiation fee for any employee who signed a “recognition slip” prior to the election. The Supreme Court concluded that this type of fee waiver allowed “the union to buy endorsements and paint a false portrait of employee support during its election campaign.” The Court said that the statutory policy favoring fair representation elections did not permit endorsements, whether for or against the union, to be “bought and sold in this fashion.” 414 U.S. 277. The savethenewspress website offers nothing of value in exchange for an employee’s endorsement of GCC. The subscription cancellation card is nothing more than a consumer boycott device directed at the general public rather than unit employees. Even so, nothing on the website implies that the Union would reward a subscriber for submitting a cancellation card.

15 The Employer’s reliance on *Gormac* is also unusual. The *Gormac* objection claimed that the union distributed a leaflet three hours before the election (decided in favor of the union by a three vote margin) containing a false and misleading claim that a large majority of employees whose signatures appeared on the flyer supported the union. Three employees whose signatures appeared there submitted affidavits claiming that they never authorized the union to use their signatures in that fashion.

20 As the Board explained in *UNISERV*, 340 NLRB 199 (2003), the Sixth Circuit continues to apply a standard in campaign propaganda cases at variance with the Board’s *Midland* case. For this reason, the Board explained that it will evaluate cases of this nature arising in the Sixth Circuit based on that court’s rule. However, this case arises in the Ninth Circuit so it should be anticipated that *Midland* will be applied.<sup>24</sup> In *Midland*, the Board effectively abandoned its efforts to regulate campaign propaganda that had long been criticized by practitioners and scholars. Thus, the Board stated:

30 [W]e rule today that we will no longer probe into the truth or falsity of the parties’ campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. *Midland*, 263 NLRB at 133, footnotes omitted.

40 Regardless, the *Gormac* opinion addresses at considerable length the “five factor test” that court adopted for analyzing misrepresentation cases *Mitchellance, Inc. v. NLRB*, 90 F.3d 1150 (6<sup>th</sup> Cir. 1996). Those factors are: (1) the timing of the misrepresentation; (2) whether the employer was aware of the situation and had an opportunity to respond; (3) the extent of the misrepresentation; (4) whether the source of the misrepresentation was identified; and (5) whether there is evidence that employees were actually affected by the misrepresentations. The court also added that it would give consideration to the election outcome and carefully review those cases where the election margin is narrow. 90 F.3d at 1155.

---

50 <sup>24</sup> Moreover, the holding in *Gormac* case actually concerned an ancillary issue, i.e. whether the Board improperly overruled the employer’s objection without a hearing. The panel majority concluded that the Board abused its discretion by doing so and remanded the case to the Board for a hearing on the objection.

I have concluded that the Employer's claims about the savethenewspress would fail under both *Midland* and *Mitchellance* especially where, as here, the employees voted for representation by an overwhelming margin. As to the tests in the latter case, the Employer points to nothing on savethenewspress that occurred at such a late hour as to preclude an effective response. Apodaca's August 10 email to Shultz about the newspaper masthead shows the Employer's careful scrutiny of savethenewspress.com nearly seven weeks before the election. No evidence shows that the Employer protested any alleged misrepresentations on that website which it now claims existed.

In addition, the Employer's claim that the heading directly above the community letter on the home page seeks to convey the message that there is "universal support" for the Union is simply frivolous. The end of the letter makes it clear that the message is from the "organized staff" rather than the entire staff which at that juncture the employees could easily construe as that group supporting the Union. Moreover, absolutely no evidence shows that any employee was "actually affected" by the content of the website.

Equally without merit is the Employer's contention that union supporters employed impermissible derogatory rhetoric to prejudice newsroom employees against management. The Employer's brief seems to label every unfavorable, anonymous blog comment it doesn't like to as the product of a union supporter. As to the blog comments detailed at pages 11 and 12, above, only that appearing in the Daily Kos is attributable to someone positively identified with the Union.

I find Employer's argument seeking to establish an interrelationship between savethenewspress.com and blog commentary appearing elsewhere without merit. The savethenewspress website does not constitute a "forged document" within the meaning of *Midland* that would "render voters unable to recognize propaganda for what it is." As found above, the contention that savethenewspress painted a false portrait of total newsroom support for the Union" – the central premise for the Employer's argument that the blog comments have significance here – cannot be taken seriously at all.

The Employer's arguments also assume that the unit employees absorbed every word on every blog like a sponge. That assumption also has no evidentiary support at all. Moreover, it appears that a certain amount of the third party vilification suffered by New-Press executives since June would have occurred even in the absence of a union representation campaign. I find it improbable that anonymous internet blog comments about Company executives would serve to sway voters let alone intimidate them. In addition, the Employer's argument even about the comments cited tends to misconstrue the actual message conveyed in two of them. True, the anonymous comment comparing McCaw to Kim Jong Il is obviously reprehensible but arguably the comment about Armstrong could be read as a sympathetic observation rather than an effort to interject those subjects into the election campaign. And admittedly, while the Union counsel's reply to "LNK" fails to provide a flattering portrait of McCaw that she might appreciate, at least he politely dismissed the suggestion about McCaw and criminal conduct.

The Employer's effort to fashion a potential forgery cognizable under *Midland* based on the savethenewspress website lacks merit for one additional and significant reason. The *Midland* Board, quoting from *Shopping Kart*, 228 NLRB 1311, 1313 (1977), said: "[W]e believe that Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it." That observation strikes me as particularly apt to this election involving a unit persons schooled in the sophisticated use of words, phrases and sentences. Accordingly, I reject the proposition the Employer, in effect, puts forth that the employees who voted this election held more than two

months after savethenewspress first appeared went to the polling place confused, coerced or intimidated by materials that appeared on that website and blog commentary elsewhere.

5 Finally, I have concluded that the blog comment aspect of Objection 2 fails because it has been raised in an untimely manner. The assertion that this election should be overturned because of largely anonymous commentary about Employer’s executives is clearly not encompassed in any of the objections. Ordinarily, the Board will not consider allegations of misconduct unrelated to timely-filed objections absent clear and convincing proof that the evidence is was newly discovered and previously unavailable. *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984). No basis exists here to apply the principles pertaining to unalleged objections addressed in *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). Therefore, I recommend that the Board overrule Objection No. 2.

15 Objection No. 3: The Employer contends that during the critical period, there were attempts by the Union to coerce employee sentiment.

20 Short Statement in Support of Objection 3: On August 24, 2006, a group of approximately 25 SBNP Union employees assembled en masse in the newsroom, halting all news functions. The group proceeded to march in single file through the SBNP offices while loudly stomping their feet. The massed group ignored their supervisor’s instructions to return to work and instead proceeded to target persons in individual offices.

25 Objection No. 3 Argument and Analysis: The Employer’s brief argues that the effort of the prounion employees to deliver letters to Armstrong on July 13 and to McCaw on August 24 coerced employee sentiment in the Union’s favor. Even though only conduct that occurs between the filing of the election petition, here August 10, and the date of the election, here September 27, would ordinarily be considered (*Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961)), the Employer argues that the July 13 action should be considered here because it “adds meaning and dimension to related postpetition conduct.” Where that is the case, prepetition conduct may be considered in assessing postpetition conduct. *Dresser Industries*, 242 NLRB 74 (1979).

35 I reject the Employer’s contention that the July 13 action constituted an intimidating situation of any sort. Although the content of the letter probably made Armstrong uncomfortable because of the temporary nature of his position, I find employee behavior on this date to have been entirely peaceful and respectful. In addition, no showing has been made that any voter was present in the newsroom other than those who actively participated in the effort to deliver the Armstrong letter. Furthermore, I find Armstrong’s effort to depict the July 13 visit by employees to his office as threatening or intimidating to be entirely manufactured for purposes of this proceeding. His purported fears are belied by his commanding style on July 6 when he weathered the invective of hostile newsroom employees while escorting former executive editor Roberts from the premises and then returned there to order another recently resigned editor out and to discuss the situation with those remaining.

45 Armstrong evidenced a strong, visceral bias toward this organizing campaign in other ways. Thus, he claimed with one breath that the group passing his office on August 24 en route to McCaw’s office reminded him of “storm troopers” but in the next breath he said there was no noise associated with their passing. In addition, his fortuitous and positive identification at the hearing of GCC organizer Keegan as the individual he twice observed sans his glasses from his apartment window sitting in a vehicle parked on an adjacent street late at night had no ring of truthfulness at all. For these reasons, I do not credit his self-serving characterizations without

convincing corroboration. By contrast, I found the testimony of Thomas Schultz, the only other witness who addressed this event at any length, to be highly credible. As to the July 13 event, he calmly agreed with a few of Armstrong’s assertions and added important factual detail with no apparent attempt to embellish what actually occurred.

5

The letter employees delivered to Armstrong, the management official in charge at the time, addresses their working conditions at the newspaper. After he expressed his discomfort with the situation and asked to speak privately with one of those he identified as a leader, the others left and, for the most part, returned to their work. No credible evidence even hints otherwise. Whether this action lasted less than a minute as Schultz recalled or as much as five minutes as Armstrong suggested matters not at all. This whole episode amounted to nothing more than a simple effort by employees to begin a conversation about their grievances and their desire for representation. No amount of prevaricating can turn it into anything else.<sup>25</sup> Therefore, I conclude that nothing which occurred on July 13 merits, as the Employer urges, the application of an exception to the *Ideal Electric* rule.

10

15

I find the August 24 employee action mirrors that of July 13 for its peaceful tone and purpose. Leaving out the extreme embellishments by Armstrong and Steepleton as well as the incendiary rhetoric in the Employers brief none of which I find reliable, the evidence reflects the 25 or so newsroom employees walked single file in a peaceful manner to McCaw’s office and then on to Apodaca’s office after it became clear that McCaw was unavailable. The record does not support the claims made in the Employer’s brief that the employees stampeded from office to office attempting to intimidate others. Again, the record does not even show that any unit employees other than the participants were in the building.

20

25

Although the group admittedly ignored Steepleton’s two commands about returning to work, the subject matter of their letter to McCaw pertained to their working conditions and their effort to secure representation. Even assuming that Andrea Huebner was incorrect in her belief that this action occurred during a break time, a peaceful three-to-five minute work interruption for this purpose would ordinarily be protected by the Act. *Quietflex Manufacturing Co.*, 344 NLRB No. 130 (2005).

30

Armstrong’s claim that Bonowitz inadvertently bumped his shoulder and then “scowled” when he entered the hallway while the group passed is of little moment. Armstrong is excluded from the unit and could not vote in the election, and no evidence of any type was presented that others who would have been voters observed Bonowitz’ scowl so as to be intimidated by it.

35

In the end, the McCaw letter was ultimately delivered to Apodaca. The fact that the Employer chose not to question Apodaca in an effort to support its claim that the employees acted like an unruly mob stampeding throughout the building merits the inference that she would not have supported this portrayal. On the contrary, Apodaca’s calm request later that Shultz deliver the letter to her and the polite exchange that took place between them at the end of the day established to my satisfaction that no basis exists to set aside this lopsided election result

40

45

<sup>25</sup> In its brief the Employer argued that Armstrong desired to leave his office and escape the “mob” surrounding him but he found his exit blocked. The brief adds that at least one employee bystander witnessed the incident, and word of the event spread quickly throughout the newsroom. Employer Br. 23. No support exists in the record for this wildly inflated argument. Armstrong made no attempt to leave. In fact, he requested one employee to remain for a private talk when the others left.

50

because of the brief work interruption that occurred on August 24. Therefore, I recommend that Objection No. 3 be overruled.

- 5 Objection No. 4: The Employer contends that during the critical period, pro-Union supervisory conduct occurred.

10 Short Statement in Support of Objection 4: As the Board can appreciate, SBNP did not question employees regarding this issue in the event it could be subjected to claims of interfering with the Section 7 rights of employees. However, the Board is in a position to conduct relevant interviews.

15 In an October 13 letter to a Region 31 attorney, the Employer elaborated on the basis for Objection 4. In that letter the Employer asserted that Objection 4 pertained to the following supervisory conduct: (1) assistant city editor Dan Myers wore a pro-union button on September 1 or 2; (2) Myers' attendance at a pro-union rally on September 24; and (3) life section editor Andrea Huebner's attendance at a pro-union rally in early August. This letter expresses the Employer's certainty that other instances of pro-union conduct by its supervisors occurred but not in a "public forum." Board Exhibit 1B, Attachment B, Page 5.

20 Objection No. 4 Argument and Analysis: Although the Employer contends that both Huebner and Myers are supervisors within the meaning of the Act, its argument on brief focuses almost entirely on Myers' conduct. Employer Br. 39-43. The Union declined to stipulate that Myers was a supervisor. In that circumstance, the Employer had the burden of proving that he was a  
25 supervisor within the meaning of Section 2(11) of the Act. That section provides:

30 The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

35 In my judgment, the evidence adduced by the Employer falls far short of establishing Myers' supervisory status. Even though Apodaca's testimony that Myers could make recommendations pertaining to the 10 to 12 employees he purportedly supervised that "might affect employee hiring, promotions, other employment activities" is uncontradicted and may well be true, it simply fails to establish that he possessed authority to "effectively recommend" actions as required by Section 2(11). Likewise, her uncontradicted testimony that he had the  
40 authority to "schedule" employees says little without evidence establishing that his scheduling duties required the exercise of independent judgment and was not merely clerical in nature. Therefore, I find that the Employer failed to meet its burden of proving that Myers was a supervisor, as claimed.

45 But even if Myers possessed supervisory authority while employed at the News-Press, I find no basis to recommend that the election be overturned by anything he was shown to have done. I make that same finding as to Huebner. In *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), the Board (Members Liebman and Walsh dissenting) undertook to "restate the legal standard to be applied in cases involving objections to an election based on supervisory  
50 pronoun conduct." At 343 NLRB 909, the *Harborside* majority stated:

When asking whether supervisory prounion conduct upsets the requisite laboratory conditions for a fair election, the Board looks to two factors.

5 (1) Whether the supervisor's prounion conduct reasonable tended to coerce or interfere with the employees' exercise of free choice in the election.

This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and contest of the conduct in question.

10 (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the  
15 conduct became known; and (e) the lingering effect of the conduct.

Applying this standard, the *Harborside* majority directed a new election after finding that a single supervisor had engaged twelve offenses that included: telling employees to sign a union card and attend union meetings; telling an employee she would lose her job if she failed to vote for a union; harassing an employee about not attending union meetings; telling an employee two days before the election that her days with the employer would be "numbered" if the union failed to win; repeatedly badgering another employee two weeks before the election about voting union and warning that the employee would lose her job if the union did not win; and so on in a similar vein. This record contains no utterance of any kind by either Huebner or Myers to any employee in support of the Union. Instead, the Employer argues, in effect, that the lopsided election should be set aside based largely on impressions employees might have gained from observing them at a union rally or, in Myers' case, at work wearing a Teamsters pin for a brief period.<sup>26</sup>

30 Huebner's presence at rallies on July 14 and July 18 obviously pre-dates the filing of GCC's election petition of August 10, and her attendance at the September 24 rally occurred roughly two weeks following her termination. Perhaps it is largely for these reasons that the

---

35 <sup>26</sup> The Employer also relies on *NLRB v. Island Film Processing Co, Inc.*, 784 F.2d 1446, 1451 (9<sup>th</sup> Cir. 1986) (the *Kahala Kai* case), for the proposition that "active" supervisory participation in the union selection process provides a basis for invalidating the election. As with *Harborside*, the *Kahala Kai* case is factually inapposite. There the court refused to enforce a Board bargaining order in a test of certification case. The court concluded that the Board erroneously certified the union in the underlying representation case over the employer's objections that four head printers initiated the organizing effort and, after they were found to be supervisors in a pre-election proceeding, they went "underground" to strong arm apathetic employees into selecting the union. In the *Kahala Kai* court's view, the actions of supervisors does not rise to the level of supervisory involvement necessary for invalidating a union selection process without there being "seeds of potential reprisal, punishment, or intimidation." *Id.* 784 F.2d 1452. For reasons detailed below none of the supervisory conduct about which the Employer complains rises to that level. Furthermore, apart from Myers' activities, all of the conduct cited by the Employer occurred outside the critical period and none of it is so clearly proscribed as to warrant setting aside the election despite that fact. Compare, *Cedars Sinai*, 342 NLRB 596, fn. 4. (2004) (no showing that threatening telephone calls to an employee occurred during the critical period).

Employer's brief appears to have abandoned its reliance on Huebner's activities as a basis for setting aside this landslide result.

5 Huebner's attended the rallies in July largely as a spectator and to mentor intern  
Hopkins. Her mere presence in the audience represented no definitive statement of any kind  
about her sympathies. She attended the July rallies essentially as a bystander rather than as a  
participant. She did not speak on behalf of any party or defend any cause at any time. Contrary  
to the Employer's claim, Huebner's attendance at rallies ten weeks before the election is entirely  
10 innocuous and falls far short of the type of supervisory conduct condemned by the Board in  
*Harborside* or by the Ninth Circuit in the *Kahala Kai* case. The fact that no management official  
ever spoke to her concerning her attendance at the July rallies reinforces my conclusion that her  
conduct had no impact on employee sentiment particularly given the prevailing atmosphere at  
SBNP at that time. Accordingly, as the employer failed to show that Huebner engaged in any  
objectionable conduct during the critical period or, for that matter, at any other time, I  
15 recommend that Objection 4 be overruled to the extent that it pertains to Huebner's conduct.

The Employer argues that Myers' button-wearing escapade, his discussions with pro-  
union employees, and his attendance at the September 24 rally merit setting aside the election  
result because it sowed the "seeds of reprisal." Employer's Brief 43.

20

Unlike Huebner's situation, Myers' conduct at least occurred during the critical period.  
Still, under the first *Harborside* test, I am unable to conclude that any of his prounion conduct  
tended to coerce or interfere with employee election choices or that it interfered with the voters'  
freedom of choice to the extent that it materially affected the election outcome. At most, Myers'  
25 supervisory authority was highly circumscribed. The Employer never established precisely what  
Myers said to any unit voter about the union organizing. Although Myers admitted that Dawn  
Hobbs, an early activist, and two prounion copy editors told him about the progress of the union  
campaign, no evidence warrants an inference that Myers coerced disclosures from these three  
or any other employees. In fact, the more reasonable inference would be that Myers'  
30 employment at the News-Press began after the organizing campaign gained most of its  
momentum and that he simply became a follower in the unionization effort.

I also find it would be unreasonable to conclude that his appearance with employees at  
the September 24 rally or his brief display of a Teamster pin on his clothing at the beginning of  
35 that month sufficed to meet either of the *Harborside* tests. The degree of union support among  
the unit employees seems to have been established early on in this campaign. As many as 20  
employees went to Armstrong's office on July 13 and even more participated in the August 24  
effort. It strikes me that it would be totally illogical to conclude that a brief button-wearing  
episode and a non-speaking appearance at the last campaign rally by the newspaper's  
40 assistant city editor served to have slightest impact on the outcome of this election.

The Union, in its words, won the election by a landslide on September 27. The  
Employer saw that outcome on the horizon well in advance of the election date. No evidence  
shows that Myers union-pin display or his appearance in the midst of the employee group on  
45 September 24 that featured California labor movement dignitaries served to create any sort of  
buzz among the unit employees. In anything, by the time Myers appeared on the scene, unit  
voters probably took little notice of his prounion sympathies.

Finally, Myers never hid his prounion sympathies; he operated entirely above ground,  
50 not underground. The mild rebuke from Steepleton over the Teamster button stands in stark  
contrast to the harsh treatment accorded some of the employee activity. Therefore, as the  
Employer did little to restrain Myers, it should estopped from benefiting from his insignificant

5 prounion activities by having this overwhelming election result set aside. *B. J. Titan Service Company*, 296 NLRB 668, fn 2 (1989). Accordingly, assuming Myers to have been a supervisor, I recommend that the Board overrule Objection 4 insofar as it pertains to his conduct because the Employer made no real effort to corral his conduct and because the nature of his conduct would not have restrained or coerced voters in this election to an extent that would have materially affected the outcome. *Harborside, supra*.

On these findings of fact and on the entire record, I issue the following recommended<sup>27</sup>

10 ORDER

15 The Objections filed by the Employer, Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press are hereby overruled in their entirety and the Graphics Communications Conference is hereby certified as the exclusive collective bargaining representative under Section 9(a) of the Act in the following appropriate unit:

20 All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Employer's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

25 Dated: March 8, 2007.

\_\_\_\_\_  
Administrative Law Judge

30  
35  
40  
45 \_\_\_\_\_  
50 <sup>27</sup> Within fourteen (14) days from the issuance of this decision and recommended order, any party may file exceptions to it with the Board in Washington, D.C. If a party files exceptions, Section 102.69 requires that an original and eight (8) copies be submitted to the Board together with a supporting brief, if desired. Any party filing exceptions must immediately serve a copy thereof on all other parties, and the Regional Director. Exceptions, if any, must be received by the Board in Washington, D.C. on or before